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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

—v.—

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND AND GAY AND LESBIAN ADVOCATES AND DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Do Washington Revised Code 26.10.160(3) and the former RCW 26.09.240, granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child," impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of a child" as defined by the liberty and privacy provision of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998) in holding that Washington Revised Code 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States constitution, when it used the flawed premise that a parent's fundamental right to autonomy in child rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

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INTRODUCTION[1]

Petitioners contest a decision of the Washington Supreme Court, *Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998), that declared unconstitutional a statute that allows "any person" at "any time" to petition for visitation with a child and goes on to provide for court-ordered visitation if it serves the child's best interests. Wash. Rev. Code § 26.10.160(3). Thus, contrary to Petitioners' presentation throughout their brief, the statute before the Court is not a "grandparent visitation statute" or a statute that in any other way limits who may petition for visitation. Petitioners could and did proceed to a merits adjudication of their request for visitation simply because "any person" could do so, not because they established a particular type or depth of relationship with the children at issue, or any other relevant fact. As in every case in which it applies, Wash. Rev. Code § 26.10.160(3) opened the courthouse door here upon too lax a standard, impermissibly infringing upon a parent's right to autonomy in the care, custody and upbringing of her children. *Amici* therefore urge this Court to declare the statute unconstitutional on its face.

INTERESTS OF THE *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and their families. Lambda advocates on behalf of parents, others involved in parenting, grandparents and young people, many

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for either party, and no one other than *amici* and their counsel has made any monetary contribution to its preparation.

of whom suffer discrimination based on their own or a family member's sexual orientation. Lambda works to ensure that children raised by lesbian and gay adults benefit from the same respect and protection for their primary relationships as do other children, including by having their family relationships or other significant relationships with adults recognized and safeguarded. Lambda also works to ensure that lesbian and gay parents are not subjected to unwarranted intrusion into their families and parenting decisions by third parties or state actors who presume to know what is best for their children. In these capacities, Lambda at various times shares the interests of adults who seek to preserve close ties to children, of children who depend on such ties and are injured by their arbitrary loss, and of legal parents who seek protection against unwarranted invasion of their family sphere.

Gay & Lesbian Advocates & Defenders ("GLAD") is a New England-wide legal rights organization which seeks equal justice under law for lesbians, gay men, bisexuals and people with HIV and AIDS. Many of GLAD's cases seek to attain legal recognition and respect for the families of such individuals and for their children. GLAD's interests fall on both sides of this case. On the one hand, GLAD seeks to protect families of intent and function who do not have access to the traditional measures marking a family. On the other hand, GLAD attempts to ensure the integrity of lesbian and gay-headed families from the intrusion of others who may disapprove of same-sex couples and parents raising children. Thus, GLAD shares the interests of some of those adults without a legal relationship to children as well as the interests of legal biological and adoptive parents.

STATUTE INVOLVED

Petitioners now rely upon only one of the two statutes challenged in their Questions Presented, Wash. Rev. Code § 26.10.160(3), which the Washington Supreme Court declared unconstitutional and which provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

SUMMARY OF THE ARGUMENT

Neither the decision of the Washington Supreme Court invalidating the state's nonparent visitation statute nor the statute itself squares with substantive due process requirements. One makes parental autonomy virtually inviolate; the other — by inviting visitation petitions from "any person" at "any time" — impermissibly allows its infringement at will. The Constitution charts a middle course. Several common threads of the Court's due process jurisprudence in the arena of parenting and family relations lead to affirmance of the judgment below, on different and narrower grounds, without reliance upon a strict scrutiny standard or requiring a showing of significant harm to a child before nonparent visitation may be ordered.

The Court has been justifiably hesitant to intervene in the complex realm of domestic relations law and to interfere with states' efforts to address the needs of modern families. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 770-73 (1982) (Rehnquist, J., dissenting). Experience has taught that

children may be raised well (or poorly) in any number of family forms, including by biological, adoptive and other legally recognized parents, by those who are married or unmarried, and by extended family members, single parents and lesbian and gay adults. Children also may benefit from significant relationships with adults, in addition to their legal parents, who are important to their physical or emotional health and development. It is, as ever, the quality and security of the relationship between individual children and adults rather than blood ties or labels that, among many other factors, determine a child's well-being.

In light of these realities, the states continue to need room to craft legal responses to changing family forms without premature or unmeasured federal intervention. As family structures evolve, there are diverging opinions as to who should have a legally protected role in a child's life. Some states are expanding who may claim parental rights through adoption statutes, equity and common law, and virtually every state has grappled with the need to address significant relationships between children and nonparent adults, including grandparents and others. Affirmance of the Washington Supreme Court's analysis would cut short much of the states' efforts to craft balanced standards.

This Court also has recognized that family cases are in many ways *sui generis*; constitutional standards in this area are calibrated closely to the infringement at issue, and competing individual interests may receive different weight in particular settings. The Court has wisely recoiled from a categorical approach to guarding parental liberty interests because the interests of children and others are also at stake, and because there is a continuum of possible government intrusions on parental liberty that touch more or less closely on the core of that right. Instead, the Court has used a nuanced approach that balances competing variables.

All the while, the Court has continued to value highly parental and familial autonomy and to assure that they cannot be lightly cast aside. As American families enter the next millennium, their members have no less need of protection from clear violations of their constitutional liberty interests. These interests protect the many children and families living outside the "nuclear family" model, like respondent and her children, who are equally important to our nation's family fabric. Parental autonomy does not abate upon the death or disappearance of one parent, nor is it reserved to married parents. This Court should reinforce the vital, autonomous nature of parental decisions affecting child custody and care and not readily permit states to substitute their will for that of parents, especially where liberty interests would be greatly burdened.[2] But it remains primarily the responsibility of states to set standards that adequately guard these constitutional interests in given circumstances.

These themes and the Court's case law direct the resolution of this case. Though petitioners properly object to the state court's reasoning and advance an appropriately more nuanced approach to due process analysis, they fail to appreciate the intrusiveness of visitation petitions and orders or to address the infirmity of the Washington statute. While subjecting a parent to court proceedings and the entry of an order for visitation with her child by a nonparent are not infringements on the parent's liberty interest nearly as substantial as termination of parental rights, or even the

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[2] The Court also has strongly protected the rights of parents under the Equal Protection Clause. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984) (states may not give effect to private biases in determining parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (unconstitutional to permit unwed mothers but not fathers to block adoption of child by withholding consent).

granting of custody rights to another,[3] neither can these be categorized as the minimal intrusions petitioners claim. At that extreme might be petitioners' example of parental challenges to books chosen by public schools. *Brief of Petitioners* ("Pet. Br.") at 28-30. But visitation proceedings and orders, demanding that a parent facilitate ongoing contact with a nonparent against her will, fall in the mid-range of infringements of the parental autonomy interest.

Court *proceedings* for visitation — or, as here, for more or different visitation than that which the legal parent freely allowed — require a parent, if she can, to marshal resources in defense of her family and cause worry and doubt as to whether the court will override her decisions about meeting her child's needs. Once a petition is initiated, a parent confronts the significant emotional and financial cost to her and her family of a court battle. She may bargain away her rights simply to avoid these harms or the stress of life

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[3] Visitation, or continuing contact with a child, is distinct from the broader array of rights that flows from having legal custody of a child. An order of custody, which is not permitted under the challenged statute and is not sought here, would require a stronger showing to satisfy constitutional requirements. *See, e.g., Buness v. Gillen*, 781 P.2d 985 (Alaska 1989) (because man acted as father figure and primary caregiver for ten years, he had standing to seek custody which could be awarded on showing of unfitness or if welfare of child requires it). For a typical description of the rights attached to custody, *see Michael H. v. Gerald D.*, 491 U.S. 110, 118-19 (1989) (plurality opinion) (*quoting* 4 *Cal. Fam. L.* § 60.02[1][b] (C. Markey ed., 1987)) ("custody ... [is] a status which 'embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.'") (footnotes omitted).

under a court order.

Visitation *orders* inject not only an uninvited person but a continuing obligation into a parent's schedule and a family's routine, requiring the parent to accommodate his plans for a child to particular times and places imposed by a court, and diminishing parental freedom to direct a child's upbringing. Such an obligation may interfere with a parent's normal decisions about things like enrolling her child in activities that occur at the scheduled time, such as sports or religious instruction, or from relocating to find a better school. It certainly constrains the spontaneous parent-child interactions and shared activities that nurture a loving parent-child bond. And, by supplanting a legal parent's judgment in favor of a court's continuing jurisdiction, visitation orders undercut parental authority.

The Constitution thus requires a more protective threshold standard than the open-ended invitation of the Washington statute for "any person" to petition at "any time." To prevent trampling upon a parent's liberty interest, a state must devise an entry-level test that accounts for parental liberty and assures there are adequate reasons for the intrusion of a court proceeding. One way this may be accomplished would be to require petitioners to demonstrate (1) the curtailment of a significant relationship with the children of a quality and depth that sets petitioners apart from the many people, even blood relatives, with whom children have positive, loving relationships, coupled with (2) a showing of prior parental knowledge and fostering of the relationship that allowed it to grow in importance to a child.

Requiring an unusually significant relationship to exist before a party can invoke the court's power to consider a visitation order against the parent's will establishes a reason for the state's interest, which the Washington statute lacks.

Such a relationship reasonably indicates that there may be an unwarranted detriment to the child from discontinuing contact. Requiring a further demonstration of parental fostering of the relationship gives weight to parental autonomy, by looking to the parent's role in causing the relationship to deepen and assuring that the petitioner is not a stranger or one whom the parent had sought to keep from his child. While other approaches could and do meet constitutional minimums, these requirements exemplify a threshold test reasonably calibrated to the burden on parental autonomy of a court proceeding to consider the imposition of a visitation order.

Once such a threshold or standing hurdle is cleared, a conventional "best interests of the child" standard would suffice to decide whether to order visitation, because, among other factors, it would include consideration of the parents' reasons for curtailing contact with the petitioning adult, any anticipated effects upon the parent-child relationship of court-ordered visitation, and the benefits to the child of maintaining the relationship with the petitioner, as well as the emotional or other detriment to the child from its possible end. The state court's requirement of "severe psychological harm," *Custody of Smith*, 137 Wash. 2d 1, 20, 969 P.2d 21, 30 (1998), however, exceeds what is constitutionally required to justify the imposition on parental liberty of visitation orders.

ARGUMENT

I. THE COURT USES A CALIBRATED APPROACH TO ASSESSING WHETHER THE DUE PROCESS CLAUSE PERMITS IMPOSITIONS ON A PARENT'S LIBERTY INTERESTS; COURT-ORDERED VISITATION WITH A NONPARENT DOES NOT WORK A DEPRIVATION THAT TRIGGERS STRICT SCRUTINY.

That legal parents[4] have a liberty interest in the care,

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[4] In this brief, the term "legal parent" includes all persons recognized as parents by state law. A legal parent who is involved with his children generally would have a right to visitation and standing to claim fuller parental rights, including custody, greater than a nonparent ordinarily could obtain. The liberty interest in parental autonomy is not limited to biological and adoptive parents, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (aunt and legal guardian enjoyed parental autonomy rights), nor do such ties guarantee full due process protections; the Constitution is concerned with protecting *de facto* parent-child relationships, not attaching rights to labels. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban*, 441 U.S. at 397 (Stewart, J., concurring); *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (citing same). *See also Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (recognizing family autonomy interest protects grandparent raising grandchildren in home).

States have based parental standing on biological or adoptive ties and also upon the actual relationship between an adult and child, looking to statutes, common law, equitable principles and parental intent. *See generally* American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, at §§ 2.03, 2.04, 2.21 (1999). Thus, for example, while "nature itself" may not provide for "dual fatherhood," *Michael H.*, 491 U.S. at 118, numerous states have done so by permitting more than one man or woman to be recognized as a child's legal parents, see, e.g., *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993), and children have benefitted as a result. American

custody and rearing of their children that merits both procedural protection and substantive recognition under the Due Process Clause of the Fourteenth Amendment has long been established. But the interests of others, especially children, also figure into the constitutional calculus and preclude any uniform description either of the state interest necessary to invade parental autonomy or of the procedures required to protect it. Instead, the Court must consider "closely and contextually" the intrusion at issue, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and balance the state and other interests supporting intrusion against that particular infringement. Because there is no "equipoise" of interests between a legal parent and a nonparent, as there is between two legal parents, *Rivera v. Minnich*, 483 U.S. 574, 581 (1987), however, the state must employ a test that gives sufficient weight to parental liberty. The challenged Washington statute leaves parents virtually defenseless against the serious infringements of those seeking nonparent visitation. But the state supreme court decision goes overboard, demanding the highest protection for parental liberties with little regard for the extent of their infringement or other interests at stake. The Constitution requires a middle

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Psychological Association, *Lesbian and Gay Parenting; A Resource for Psychologists* at 8 (1995) ("Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.") And, where petitioner planned with a partner to bring children into the world and to share responsibility for them and then followed through, she has been recognized as a *de facto* parent. *See, e.g., E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999), *cert. denied*, No. 99-531, 68 U.S.L.W. 3323 (U.S. Nov. 15, 1999). While a person recognized as a legal parent would have a relationship allowing a claim for visitation to proceed, petitioners need not be legal parents before a state may act to protect their bonds with a child through visitation. *See, e.g., Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989) (stepparent entitled to visitation in best interests of child).

ground that affords sufficient protection for parental autonomy without foreclosing measured state action to preserve relationships important to children.

The Court has described the interest in family autonomy and privacy and the liberty interest of legal parents in the care, custody and rearing of their children in broad terms, and as "fundamental," "deeply rooted" or "'of basic importance'," *M.L.B.*, 519 U.S. at 116 (*quoting Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)); *Santosky*, 455 U.S. at 753; *Moore*, 431 U.S. at 503 (plurality opinion), but has made plain that the constitutional stakes vary with the extent and nature of the infringement at issue, and the interests of children and involved others. *See generally* Pet. Br. at 22-26; *Michael H.*, 491 U.S. at 128-30; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

Thus, the Court looks first at the extent of the government's interference with the exercise of fundamental rights bearing upon "the decision to marry . . . procreation, childbirth, child rearing, and family relationships." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The Court has been careful, for example, to distinguish incursions which "interfere directly and substantially with the right," *id.* at 387, from lesser, more indirect invasions. *Id.* Here, the right to parental autonomy in the care, custody and upbringing of children necessarily encompasses a range of decisions and, from the perspective of the state, a range of possible infringements. Meaningful constitutional scrutiny should apply, calibrated to the seriousness of the infringement, across this full range — rather than an approach of either strict scrutiny or highly deferential rational basis review. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (statute compelling parents to send children to public schools "unreasonably interferes" with parental liberty). A more sensitive, balancing standard best protects parental autonomy

without unduly restricting government action on behalf of children or in furtherance of other important interests.

The Court likewise has recognized that there is a continuum of governmental infringements on parental autonomy that affect procedural protections that must be afforded, distinguishing, for example, the unique deprivation of terminating parental rights from infringements such as "loss of custody, which does not sever the parent-child bond," *M.L.B.*, 519 U.S. at 121, or from divorce, paternity or other matters. *Id.* at 127-28 (citations omitted). *See also Rivera*, 483 U.S. at 579 (distinguishing paternity from termination of rights proceedings). In measuring whether procedural standards are adequate to protect parental liberty, the Court also has considered a child's interest in the stability of her bonds with active caregivers. The Constitution does not, for example, require the states to afford rigorous protection to genetic parental links where the parent has not sought or developed a meaningful connection to a child. *See, e.g., Lehr*, 463 U.S. at 262 (rights of putative father with no actual relationship to child given adequate protection by availability of putative father registry; notice of adoption proceedings not required). Parents who do not participate in childrearing or in creating an actual parent-child bond cannot claim "substantial protection under the due process clause" for the inchoate parent-child relationship. *Id.* at 261; *Quilloin*, 434 U.S. at 253, 254-55 ("best interests of the child" standard in adoption proceeding, rather than right to veto adoption, sufficiently protected liberty interest of biological father who never petitioned to legitimate child, had visited sporadically, provided only irregular support and "had never been a de facto member of the child's family unit").

In contrast to these precedents, the Washington Supreme Court adopts an absolute requirement of substantial or even "severe" harm in order to infringe parental autonomy

to any degree, characterizing all infringements of parental liberty as so inherently grave as to trigger strict scrutiny. *Custody of Smith*, 137 Wash. 2d at 14-21, 969 P.2d at 27-31. This clearly has not been traditionally required. For example, persons acting *in loco parentis* may claim continued contact with a child for whom they have cared, and may also be entitled to seek custody, without having to show that severe harm awaits the child if the relationship is discontinued, *see, e.g., Gribble v. Gribble*, 583 P.2d 64, 66-7 (Utah 1978) (visitation petitioner acting *in loco parentis* to child entitled to hearing based on relationship with child; legal parent cannot unilaterally end relationship); *V.C. v. M.J.B.*, 319 N.J. Super. 103, 114, 725 A.2d 13, 20 (1999) (lesbian partner who "stands in the shoes of a parent" entitled to visitation and to seek custody), and men mistaken or misled about their biological connection to a child they have assisted in raising have nevertheless been afforded the right to petition for visitation, *see, e.g., Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868 (1996). On the other hand, the Washington legislature imposes a standard according virtually no respect to parental autonomy, allowing "any person" to petition for visitation at "any time" and permitting courts to allow such visitation when, in a judge's discretion, it serves the best interests of a child. Wash. Rev. Code § 26.10.160(3). The Constitution requires the states to chart a course between these two extremes, one that allows the states latitude to balance the valid and competing interests at stake without discounting parental liberty.

II. THE WASHINGTON STATUTE ERECTS NO BARRIER TO INVASIONS OF PARENTAL AUTONOMY AND IS UNCONSTITUTIONAL; A THRESHOLD SHOWING OF A SIGNIFICANT RELATIONSHIP WITH A CHILD THAT WAS FOSTERED BY A LEGAL PARENT JUSTIFIES VISITATION PROCEEDINGS AND ALLOWS A VISITATION ORDER IN A CHILD'S BEST INTERESTS.

A. The Washington Statute Provides No Threshold Protection For Parental Autonomy And Is Therefore Unconstitutional In All Of Its Applications.

State standards for nonparent visitation must address due process concerns that arise both at the courthouse door and at final judgment. States must take into account the very real intrusion on parental autonomy of being forced into court to defend against a nonparent visitation petition and rendered vulnerable to state supervision of one's parental decisions. This is a debilitating invasion of family security and resources for which a state must require a sufficient threshold showing, one that balances appropriately the states' significant interest in preserving key relationships for children with considerations of parental autonomy. While the showing required to bring a petition may be less than that necessary to obtain an order of visitation, allowing claims to go forward at all is still a weighty intrusion for which the standard of allowing "any person" at "any time" to petition is constitutionally deficient in all cases. Such a low threshold does not demand a sufficient reason, or any reason, before allowing a nonparent to infringe upon parental autonomy and

force parents into court.[5] The states must craft tests that shield parents from the claims of mere acquaintances and most blood relations, screening out persons with no unique relationship meriting the state's interest. Under Washington's standard, petitioners did not have to show any prior relationship with respondent's children, let alone one meriting the state's interest, to proceed to a full hearing and judgment.[6]

Allowing petitions by anyone, at any time, is no standard at all. For the parental autonomy right to have meaning, it cannot allow states to subject legal parents so easily to court action threatening to override decisions about how and with whom their children spend their time. The prospect of protracted litigation alone is an intrusion. Many a parent rationally would trade away his rightful autonomy in favor of settling the dispute rather than subjecting his family to the financial and emotional strain of litigation and risking an inflexible and invasive court order. Washington must require some demonstration of a countervailing interest that merits its concern and permits this imposition. Indeed, the Court has greatly restricted the process due even a biological

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[5] A state's usual protections against frivolous petitions would be of little use against so low a threshold. *Cf. Boddie*, 401 U.S. at 381-82 (protections against frivolous petitions offer sufficient protection of state's interests and do not justify depriving individuals of access to court to advance right of divorce).

[6] Reported cases well illustrate that the intrusion of court-ordered visitation is very real, and that proceedings for such orders tend to stir up existing hornet's nests of animosity. *See, e.g., Herndon v. Tuhey*, 857 S.W.2d 203, 204 (Mo. 1993) (*en banc*) ("A neutral observer might describe [the child's] parents and grandparents as resolute, strong-willed, tenacious and persevering. A different observer, equally neutral, might describe the same characteristics as obstinate, inflexible, unyielding, and even stubborn or hardheaded. . . . [T]he law is very inadequate when it comes to solving the personal problems of an embattled family.").

father who cannot demonstrate a meaningful relationship with his child, drawing a distinction between "developed" and "potential" parent-child relationships. *Lehr*, 463 U.S. at 261. A biological father with no actual "custodial, personal, or financial relationship" to his child enjoys no constitutional guarantee that a state must "listen to his opinion of where the child's best interests lie" simply because of his genetic connection to his offspring. *Id.* at 262. A *nonparent* with no measurable bond to a child certainly could not claim any greater protection and the state would have no discernible interest in allowing her claim. Likewise, the child's interests in such a case, particularly absent substantial harm, are those identified in *Lehr*, to have protection and "full recognition [of] a family unit already in existence." *Id.* at 263 n.19. Because the statute imposes on parental autonomy without sufficient reason, it must be struck down under any formulation of the standard for facial challenges.[7] Pet. Br. at 19.

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[7] The Brief of Grandparent Caregiver Law Center of the Brookdale Center on Aging as *Amicus Curiae* in Support of Petitioners at p. 5 n.5 takes the position that "[i]n a court's initial application of a best interests analysis, the person being deprived of visitation must necessarily show some unsatisfactory condition related to the child; *i.e.*, some harm, such as the loss of a substantial beneficial relationship, is required in order to overcome the burdensome weight that a court proceeding (and an award of visitation) would place on the parents and the children." There is a best interests standard in the Washington statute's second sentence, but none is found in the "standing" requirement of its first sentence. The Washington Supreme Court rejected any judicial gloss upon the plain language of the statute's standing threshold. *Custody of Smith*, 137 Wash.2d at 11, 12, 969 P.2d at 26 ("[T]he plain language of RCW 26.10.160(3) allows 'any person' to petition for visitation 'at any time'. . . . We decline to construe the language of RCW 26.10.160(3) because we find that the language of the statute is unambiguous"). The Court, of course, is bound by the Washington Supreme Court's construction of its statute, *New York v. Ferber*, 458 U.S. 747, 767 (1982).

This is not to say that the Constitution excludes visitation by anyone in particular or requires categorical restrictions on who may file such petitions. To the contrary, a state may wisely permit a wide range of persons to petition for visitation, and there is a logic in doing so. But the state must use a threshold standard that at least ensures individual petitioners have sufficient cause to invoke the state's intrusive powers. This obviously could *include* pleading severe harm to a child — a standard that generally allows states to assume custody and place children with strangers — but the Washington Supreme Court errs in holding this factor constitutionally mandated for all nonparent visitation. Due process is afforded by requiring, for example, a showing of a threat to a child's unusually significant relationship, if it is one that the parent had previously exercised her autonomy to foster, and many states have premised visitation upon such a showing. *See* Section II-B, *infra*.

Tellingly, petitioners do not defend the statute's "any person" at "any time" standard. Pet. Br. at 10 ("Legislation framed in this manner was not intended to authorize visitation suits by total strangers.").[8] Indeed, petitioners frame this case

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[8] While petitioners discount the possibility that courts will allow persons with scant ties to a child to press their claims, Pet. Br. at 10, *amici* can well imagine a judge with different ideas about how a child should be raised ordering contact with a child on a nominal showing of best interests, particularly where a family's form is unfamiliar. *Amici* have fought courts that have appointed an organization as guardian for the children of a lesbian mother *based upon* its long record of opposing recognition of lesbian and gay families, *In re C.M.A.*, 306 Ill. App. 3d 1061, 715 N.E.2d 674 (1999) (rejecting appointment of Family Research Council, motivated by trial judge's personal bias against lesbians, to represent interests of child of lesbian mother in second-parent adoption proceedings) and appointed virtual strangers rather than long-term lesbian partners as guardians over the person of disabled adults, *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790 (Minn. Ct. App.

as one about a grandparent visitation statute, *e.g.*, Pet Br. at 8-15, as if Washington had required them at least to establish that they were grandparents before bringing such a petition. But the statute did not even do that much. The challenged statute does not actually impose a threshold showing on any petitioner, *Custody of Smith*, 137 Wash. 2d at 11, 12, 969 P.2d at 26, and petitioners here cannot succeed by asserting they would prevail under elevated standards that Washington does not mandate.[9]

Because the Washington statute contains no threshold protection for parental autonomy interests, it is unconstitutional in all its applications and should be struck down.

B. A Threshold Standard Is Sufficient If It Requires Both An Unusually Significant Relationship And Proper Deference To Parental Autonomy.

Most states do erect hurdles that must be cleared, even by grandparents, before a child's best interests become the court's focus in a nonparent visitation proceeding. *See generally* Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 B.Y.U. J. Pub. L. 355 (1999). If parental autonomy is guarded by a properly constructed threshold standard, the vast majority of relatives and acquaintances —

1991), *rev. denied*, Feb. 10, 1992 (reversing denial of petition by lesbian to be guardian for disabled long-time partner, for whom she had provided rehabilitative care; petition that was supported by 16 medical witnesses had been denied in favor of person who did not petition and had rarely seen Kowalski).

[9] If the petitioners do meet a higher threshold, nothing stops them from re-petitioning under a revised statute, should this Court affirm the current statute's unconstitutionality and the legislature act to amend it.

let alone strangers on the street — will have no grounds to subject parents to court scrutiny of their childrearing decisions, as even loving grandparents, aunts or former boyfriends will not generally qualify to seek court-ordered visitation. What the state must strive for is a proper balance of the competing interests at stake that does not unreasonably jeopardize the parent's liberty in light of the intrusion at issue.

Many standards may be possible and the states should have room to craft options. But *amici* discern a logical two-part threshold from the Court's prior precedents that, in the mine run of cases, would erect a sufficient bulwark against the injury of invasive visitation proceedings. The first requirement is the existence of a significant relationship of caregiving or other fundamental importance between the nonparent and child of a quality and depth that sets it apart from the many other loving relationships that a lucky child enjoys. These are the few relationships that warrant the concern of the states. *See, e.g., V.C.*, 319 N.J. Super. at 112-13, 725 A.2d at 13, 18-19 (recognizing state interest in protecting child's relationship with biological mother's lesbian partner, who acted as psychological parent). This initial requirement, keyed to the nature and depth of the actual relationship, is consistent with the Court's focus on demonstrated bonds rather than ties assumed from blood. *Lehr*, 463 U.S. at 261-62. It establishes a reason for the state even to consider, in the *child's* behalf, the initial intrusion upon parental autonomy of court proceedings: the state's interest would be to prevent an emotional or other detriment to the child.

While no single element is dispositive, key indicators of a significant relationship would include the regular performance of nurturing and parenting functions such as feeding, clothing, guiding the children's development and activities, or financially supporting the children over a

significant length of time. For younger children, unable to articulate the importance of their attachment to adults, the regular performance of intimate caregiving functions over time, at the parent's behest, is perhaps most telling. *See, e.g., J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996) (parties "by their conduct" created bond between biological mother's child and lesbian partner that provided standing to seek partial custody); *A.C. v. C.B.*, 113 N.M. 581, 586, 829 P.2d 660, 665 (1992), *cert. denied*, 113 N.M. 449, 827 P.2d 837 (1992) (woman who raised and cared for child with biological mother until age seven has colorable claim to visitation or shared custody). Evidence of an extraordinary emotional bond, beyond general demonstrations of love and support, on which the children have come to depend, also would suffice, particularly for older children. The fact that children have lived with a petitioner for a meaningful period of time and formed with them part of an extended family household also would be relevant. *Moore*, 431 U.S. at 505. Blood relatives, just as unrelated persons, who have played an exceptionally important role in children's lives should cross this threshold. *Id.* Other petitioners also could be constitutionally provided relief, and blood ties or shared residency alone should not relieve petitioners of affirmatively demonstrating an unusually significant relationship. *Quilloin*, 434 U.S. at 254-55.

The existence of a significant relationship is one means to establish a state's interest,[10] but should not alone

[10] Some state statutes permit courts to consider ordering nonparent visitation only upon a "disruption" in the family — typically divorce, death of one parent or an ongoing custody dispute. *See generally* Averett, 13 B.Y.U. J. Pub. L. at 357-61 Like the death of petitioner's son in this case, however, these events do not themselves dissipate parental autonomy. *See,* Section II-C, *infra.* Insofar as unusually significant relationships between nonparents and children are disrupted by such

justify a state veto of the parent's decision about continuing the relationship, especially where the parent had been unaware of or had actively discouraged the relationship. Because there is not an equivalency of interests, for constitutional purposes, between a legal parent and a nonparent, *Rivera*, 483 U.S. at 581, even one whose relationship is significant to a child, a second threshold factor that gives appropriate weight to parental autonomy in light of the intrusion at issue also is necessary to achieve a proper constitutional balance. The state needs to have a sufficient reason to intervene and to assess the parent's view of her child's welfare.

A showing that an involved parent had previously exercised her autonomy to permit or encourage the child to form an exceptionally strong bond with the petitioner provides cause for the state to assess the parent's decision to cut off or circumscribe such an important relationship. *See, e.g., In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), *cert. denied*, 516 U.S. 975 (1995) (permitting visitation by lesbian former partner upon showing including parental fostering of important relationship with her child). When it was the parent's exercise of autonomy that fostered formation of a close relationship between her child and the nonparent in the first place, the parent has herself affirmed its importance to the child, underscoring that there is sufficient basis for state concern about the child's need for continuing that relationship. *Compare Smith v. Organization*

events, they are, of course, relevant. Nevertheless, statutes opening the courthouse door only upon specified disruptions are unduly limited, and they may raise other constitutional issues not now before the Court. Continuing an unusually significant relationship in a child's life can be a vital need, and the state is justified in addressing it even absent circumstances such as death, divorce, or custody litigation.

of Foster Families, 431 U.S. 816, 846-47 (1977) (giving substantial weight to fact that parent expressly intended not to subordinate autonomy to claim of foster parent in denying foster parent visitation; parent's agreement to allow relationship with foster parent to form was contingent on contract to regain full autonomy); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 865, 876 (1997) (state's interest in prohibiting "indecent" communications to minors not as strong where parent wishes to disseminate messages to children for their benefit). In the context of visitation proceedings, the burden imposed on the parent's liberty falls well short of a complete deprivation of core custodial rights and therefore a demonstration that the parent previously fostered the significant relationship sufficiently guards parental rights to autonomy.

Allowing children to be around relatives or other individuals on periodic vacations or while, as here, they are in another's care, or sending a child for visits with neighbors or to day care, or briefly sharing a family home with another — all of these are qualitatively different from intentionally fostering a relationship of dependency, caregiving and significant emotional depth between one's child and a nonparent. The former examples are necessary and routine interactions in a child's life and should be possible, even encouraged, without causing parents to wonder if their rights to parental decision-making will be diminished thereby. This is, of course, particularly true of placing children in the hands of a compensated caretaker whose relationship to the children is literally purchased by the parents and revocable at their will. Parents should not be inappropriately chilled in exercising their liberty interest in caring for and socializing their children.

But where a petitioner can produce sufficient evidence that a legal parent exercised his discretion and authority to foster development of a significant relationship between the parent and child over time, presumably because he believed it in the child's best interests, the parent's later claim that continuing the relationship is a significant infringement upon his autonomy, while relevant to ordering visitation, should not bar petitions. The parent's constitutional interest must cede enough to allow evaluation of whether the loss of a relationship the parent himself encouraged to gain importance is adverse to the child's interests. Such a threshold element provides sufficient consideration of parental liberty interests, balanced against the interests of the child in maintaining these significant bonds, to consider entry of a visitation order in favor of a nonparent.

Many courts have looked to just such factors, particularly in cases involving gay and lesbian couples who parent jointly. Indeed, the latter situation exemplifies why the proposed threshold is workable and sound. These cases typically involve a long-term lesbian or gay couple who had decided jointly to raise a child as equal parents, chosen one partner to be a biological or adoptive parent, followed through on their agreement and some years later broke up. In the throes of the relationship's end, or shortly after, the biological parent goes back on the parties' understanding. She claims a right, based on her standing as the sole parent as defined by statute, to deny her former partner any further contact with the child she had brought into the world, closely nurtured and supported. In such circumstances, numerous courts responsibly have held that both adult-child relationships are entitled to protection, with the nonbiological partner receiving at least visitation with the child she had long raised and always treated as her own. Key to these decisions has been the constancy and unique quality of the bond between

petitioner and child, and the fact that the legally recognized parent actively fostered the relationship over time. *See, e.g., Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419; *V.C.*, 319 N.J. Super. at 114, 725 A.2d at 20; *J.A.L.*, 453 Pa. Super. 78, 682 A.2d 1314; *A.C.*, 113 N.M. 581, 829 P.2d 660.

In the case at bar, the Court finds petitioners whose feelings for their grandchildren are, by all appearances, loving and positive, but whose contact with them has not been extended or out of the ordinary. Pet. Br. at 2. Moreover, their visitation was never terminated by respondent, merely lessened. The contact petitioners enjoyed before seeking court intervention seems to have occurred largely secondhand, as a happenstance of other close family members caring for the child. *Id.* It may be that petitioners could meet a higher threshold standard if the statute is revised and they attempt to pursue visitation under a new statute. They were not asked to do so here. On this record, it cannot be said that the relationship is characterized by the kind of caregiving or fundamental importance that sets it apart from other bonds and merits consideration of a court order substituting for the surviving parent's judgment. Nor does it appear that the children's legal parent intended to foster an unusually significant relationship between them and petitioners. Even close relatives desiring court-ordered visitation should not be able to rely on the fact of kinship alone to establish a relationship sufficient to invade the parent's autonomy over child-rearing through court-ordered visitation.

Nor should respondent receive less protection for her constitutional liberty interest as a parent because she never married the children's father, because they separated, or because he has died. The Constitution's protections for families are not limited to married, two-parent couples. *Michael H.*, 491 U.S. at 123 n.3; *Moore*, 431 U.S. at 505. Liberty interests in childrearing are individually held, and the

fact that one parent is absent or deceased does not transfer rights to extended family members or decrease protections afforded remaining parents or their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (state cannot deprive unwed father of his parental rights upon death of mother without showing of unfitness); *Levy v. Louisiana*, 391 U.S. 68, 71-2 (1968) (children of unwed parents may not be denied wrongful death action available to other children; "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong inflicted on the mother"). *Cf. Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (striking down grandparent visitation statute under state constitution and holding that a parent's liberty interest is unaffected by whether family is "intact" or divorced). Respondent, a fit and active parent, is entitled to full protection of her parental autonomy interests, including the right to make changes in her children's lives upon the death of their biological father, without undue interference from the state or surviving relatives. Were it otherwise, parental autonomy could be destroyed by petitions from multiple grandparents and other well-meaning friends and kin, perhaps just when the surviving parent-child bond is most vulnerable and in need of protection.

C. A Contextually Appropriate Best Interests Of The Child Standard Is Sufficient, After Threshold Requirements Are Established By Evidence, To Order Nonparent Visitation.

A statute that observes the two constitutional minimums suggested here or a comparable threshold for petitioning, and then goes on to the traditional requirement all states employ of determining if a visitation order will serve the child's best interests, Averett, 13 B.Y.U. J. Pub. L. at 356, will not impose too strongly on parental liberty given the

infringement at issue. Review under the best interests standard requires the court to consider factors as extreme as abuse or indiscretion from which the child should be shielded, but also more mundane effects on decisionmaking such as changes in schedule, activities and school and neighborhood choices. A contextually appropriate best interests standard for ordering visitation also will consider an involved parent's explanation of why contact was ended or curtailed, or comparable factors. *See, e.g., N.H. Rev. Stat. Ann.* § 458:17-d II (1992); *Ariz. Rev. Stat. Ann.* § 25-409 (West 1997). In addition, a best interests test also properly considers any negative impact of court-ordered visitation on the parent-child bond, which is a key concern, *see, e.g., N.J. Stat. Ann.* § 9:2-7.1.b (West 1998); 23 *Pa. Cons. Stat. Ann.* §§ 5311-5313 (West 1997), as well as the positive aspects of continuing the significant relationship with the nonparent.

The best interests standard also would require consideration of the extent of any emotional, financial or other detriment to the child that would be ameliorated by ordering visitation. But the "severe psychological harm" contemplated by the Washington court, *Custody of Smith*, 137 Wash. 2d at 20, 969 P.2d at 30, is not required to justify the intrusion of visitation if the proposed threshold standard is met. A lesser showing of detriment is adequate because nonparent visitation decrees do not completely deprive parents of their autonomy, nor do they transfer core custodial rights.[11] A court order may appropriately be entered to spare

[11] Orders that allow excessive visitation impose more directly upon the core of the legal parent's interest in custody and control, as do provisions that accord decisionmaking power on significant matters to nonparents or restrict other fundamental rights, such as the right to travel. State courts have acted to invalidate or amend such decrees to protect parent-child interests. *See, e.g., Herndon,* 857 S.W.2d at 210-11 (upholding grandparent visitation statute against federal constitutional

a child the detrimental experience of an emotional loss or, especially for younger children, the loss of a consistent caregiver or provider.

Such a standard, after the required threshold factors are met, is adequately calibrated to the intrusiveness of visitation orders. These orders do restrict parental autonomy and control over a child's upbringing by forcing schedule and other accommodations. But even with a visitation decree in place, the petitioner cannot pull children in or out of school, enroll them for religious training, authorize non-emergency medical care, or make other critical decisions in the upbringing of a child without the legal parent's consent. These orders do not prevent exercise of core custodial rights or substantially hamper the parent's say over his child's development. Legal parents retain their freedom to determine fundamental matters such as schooling, religion, medical care and the like. Moreover, while being subject to court orders and a court's continuing jurisdiction is intrusive and can be manipulated, the fact that visitation orders are malleable and subject to amendment in response to changed circumstances lessens the gravity of the harm.

challenge but striking down visitation order comparable in scope to that awarded legal parents).

CONCLUSION

For all the reasons stated above, the judgment of the Washington Supreme Court should be affirmed.

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Respectfully submitted,

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